

The Twin City Hospital Corporation and Aluminum, Brick and Glass Workers, International Union, AFL-CIO. Case 8-CA-20975

August 21, 1991

**SUPPLEMENTAL DECISION, ORDER, AND
DIRECTION OF SECOND ELECTION**

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT

On December 30, 1988, the National Labor Relations Board issued a Decision and Order¹ in which the Board found that the Respondent had violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by refusing to bargain with the Union. Subsequently, the Respondent filed with the United States Court of Appeals for the Sixth Circuit a petition for review of the Board's Order, and the General Counsel filed a cross-application for enforcement.

Thereafter, on November 22, 1989, the court granted the Respondent's petition for review, denied the Board's cross-petition for enforcement, and remanded the case to the Board.² Although the court affirmed the Board's placement of the registered nurses in the professional unit, the court found that the evidence was insufficient to establish that the medical technologists and the medical laboratory technologists are professional employees. More specifically, the court found that the record was insufficient to establish that the technologists' work was "intellectual in nature and that the work involves the consistent exercise of discretion and judgment."³

On July 11, 1990, the Board advised the parties that it had accepted the court's remand and issued an Order reopening the record and remanding the proceeding to the Regional Director for a hearing before an administrative law judge.

On July 26, the Regional Director issued a notice of hearing scheduling a hearing for November 6. On November 2, the Respondent filed a Request for Special Permission to Appeal the Denial of the Employer's Request for a Continuance and Motion for an Order Vacating the Board's July 11, 1990 Order Remanding this Proceeding to the Regional Director and an Order to Institute Representation Proceedings in this Matter.

On November 7, the Board (Member Oviatt dissenting) issued an Order in which it denied the Respondent's appeal to the extent that it was based on the contention that it is inappropriate to remand this matter in

the posture of an unfair labor practice proceeding rather than a representation proceeding. The Board noted, however, that in the circumstances of this case, the introduction of evidence on which to determine the status of the technologists rests on the Respondent and the Union and the role of the General Counsel is non-adversarial "as would be the case if the proceedings had not proceeded beyond the representation stage" See *Salem Village I*, 263 NLRB 704 (1982). Accordingly, the Board's July 11 Order was modified to provide that after the parties had been afforded an opportunity to adduce additional evidence, the administrative law judge would transfer this matter directly to the Board, without making any credibility resolutions, findings of fact, or recommendations, and without issuing a decision under Section 102.45 of the Rules and Regulations.

Pursuant to the Board's amended remand Order, a hearing was held on January 11, 1991. On February 1, 1991, Administrative Law Judge Joel A. Harmatz transferred this proceeding to the Board. Both the Respondent and the Charging Party Union filed posthearing briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case, including the hearing transcript and posthearing briefs and the circuit court's remand and has decided, on reconsideration and for the reasons set forth below, to reinstate the bargaining order as to unit A,⁴ to set aside the election in Case 8-RC-13687, to vacate the previously issued bargaining order as to unit B,⁵ to revoke the certification in Case 8-RC-13687, and to remand Case 8-RC-13687 for the purpose of conducting a second election.

Section 2(12) of the Act defines "professional employee" as

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a

¹ 292 NLRB 114 (1988).

² 889 F.2d 1557 (6th Cir. 1989).

³ Id. at 1564. The court found that substantial evidence supported the Board's determination that the laboratory employees were professionals under the other two of the four statutory criteria for determining professional status (that the work require advanced educational training and that it cannot be standardized in relation to a given period of time). See Sec. 2(12) of the Act, set forth infra.

⁴ All service, maintenance, technical and clerical employees, excluding day care employees, professional employees, confidential employees, managerial employees and guards and supervisors as defined in the Act.

⁵ All professional employees including registered nurses, medical technicians and medical laboratory technicians, excluding all guards and supervisors as defined in the Act and all other employees.

general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes

Following the Board's established criteria:

Technical employees are those "who do not meet the strict requirements of the term 'professional employee' as defined in the Act but whose work is of a technical nature involving the use of independent judgment and requiring the exercise of specialized training"⁶

We find that the record does not establish that the work of the medical technologists and medical laboratory technologists at the Twin City Hospital involves the "consistent exercise of discretion and judgment in its performance." (Emphasis added.) Similarly, the record does not show that the work is *predominantly* intellectual in character (emphasis added). We, therefore, now find that those employees are not professionals.

The technologists mainly perform various laboratory tests on patient samples pursuant to requests by a physician. The technologists collect the samples, perform quality control work, maintain the testing machines, distribute the lab reports, and prepare various laboratory paperwork. The laboratory is divided into the following departments: hematology, chemistry, microbiology, urinalysis, and blood banking. The laboratory receives orders from physicians, or their agents, to obtain blood or other specimens from patients. Once the samples are obtained, they are logged in at the laboratory and the technologists perform the tests as requested.

The work in the chemistry⁷ and hematology departments constitutes 70 to 85 percent of the laboratory's total. This testing is highly mechanized and completely automated. The machines perform the calculations to show which test results are above or below the normal range. The technologists do not decide what tests to run. In fact, the Respondent's procedures prohibit tests that are not ordered by a physician. The technologists are limited to obtaining and preparing the specimen and reading the results produced by the instrument. The technologist must review the results against expected outcomes of the tests in light of the diagnosis of the patient. The technologists do not have to determine what constitutes a normal or abnormal result. The instrument itself flags abnormal or panic value⁸ test results. When such a result is reported by the instrument, the technologist, alone, must determine whether it was

caused by human error in performing the test or calibrating the machine or whether there was a problem with the specimen. If the specimen is the problem, the technologist determines if the specimen can be reprocessed or altered or whether to rerun the test.

The procedures to be followed when an employee gets abnormal or panic value results are set forth in detail in the laboratory's procedure manuals. Gilham, a medical laboratory technologist at Twin City Hospital in 1987 (the relevant timeframe) who testified on behalf of the Union, stated that the detailed and mandatory standardized procedures for each test performed in the laboratory must be followed according to both hospital and Joint Accreditation Commission rules. The technologist must then inform the appropriate parties of the test results.

Microbiology tests, constituting 5 to 10 percent of the laboratory work, are not automated, however, and require visual inspection and human identification of pathogens. According to Gilham, when testing drug interaction with the pathogens, the technologists follow a specified checklist, based on the type of organism.

The remaining duties performed by these employees consist of routine maintenance and cleaning of instruments and troubleshooting minor repairs, and checking quality control for the equipment in the laboratory. In performing quality control, employees use commercially prepared control tests that have known values, which are run pursuant to normal protocols and procedures associated with testing in the laboratory generally. When asked whether any judgment is required in determining whether the quality control test results are accurate, Gilham conceded that no judgment was required to look at the criteria and compare it against what was measured on the machine. If the result falls outside the normal range, the technologist routinely would check the vial, check the chemicals inside the machine, look at the machine itself, and check for a technical error on the technologist's part. Gilham testified that "it is almost wrote [sic] that you go through a series like that." If the problem is a mechanical malfunction, Gilham testified that he would consult the manufacturer's troubleshooting checklist to perform minor repairs and, if necessary, consult a service technician. For the most part, however, the machinery ran well, according to Gilham.

We find that the record does not establish that the Respondent's medical technologists and medical laboratory technologists are professional employees. The evidence shows that they exercise no discretion in determining what tests to run. Nor do they exercise discretion in determining what constitutes an abnormal or panic value test result. These values are posted throughout the lab and in the procedures manuals. To the extent that the technologists do exercise discretion in checking for the source of abnormal test results, the record indicates that this is routine work rather than

⁶Barnert Hospital Center, 217 NLRB 775, 777 (1975), quoting from *Litton Industries*, 125 NLRB 722, 724-725 (1959).

⁷Urinalysis is done in the chemistry department.

⁸"Panic" values are test results that are so far outside normal range that the technologist must inform the physician immediately.

predominantly intellectual work and is mandated by the policies and procedures manual for each department. There is no evidence that the technologist prepares a report containing a recitation of the test and its results and the opinion and recommendation of the technologist.

The work requiring the most discretion and judgment—the microbiology work—constitutes only a minor portion of the technologists' workload. It is, therefore, an insufficient basis on which to conclude that the totality of the employees' duties is predominantly intellectual in nature and requires the consistent exercise of judgment and discretion.

After considering all the relevant evidence, we find that the medical technologists and medical laboratory technologists in question do not consistently exercise independent judgment and discretion in the performance of their duties and that the work is not predominantly intellectual in character. Thus, we reverse our original finding that these technologists are professional employees.⁹ Accordingly, we also reverse our earlier finding that the Respondent violated Section 8(a)(5) and (1) of the Act when it refused to bargain with unit B, the unit of professional employees which included technologists, and vacate the bargaining order with respect to that unit. We affirm our decision ordering bargaining in the nonprofessional unit.¹⁰

ORDER

The National Labor Relations Board modifies the Order previously entered in this proceeding on December 30, 1988 (292 NLRB 114), by:

1. Substituting the following for paragraphs 2(a) and (b).

“(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of em-

ployment and, if an understanding is reached, embody the understanding in a signed agreement:

“All service, maintenance, technical and clerical employees, excluding day care employees, professional employees, confidential employees, managerial employees and guards and supervisors as defined in the Act.

“(b) Post at its facility in Dennison, Ohio, copies of the attached notice marked ‘Appendix.’⁶ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.”

2. Substituting the attached notice for that in 292 NLRB 114.

IT IS FURTHER ORDERED that Case 8–RC–13687 is reopened; that the Certification of Representative issued in Case 8–RC–13687 is revoked; that the election held on December 11, 1987, is set aside, and that the case is remanded to the Regional Director for Region 8 for the purpose of scheduling and conducting a second election in the following appropriate unit:

All professional employees, including registered nurses, excluding all guards and supervisors as defined in the Act and all other employees.

[Direction of Second Election omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with the Aluminum, Brick and Glass Workers, International Union, AFL–CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

⁹We recognize that in numerous cases the Board has found laboratory technologists to be professionals. See, e.g., *St. Barnabas Hospital*, 283 NLRB 472 (1987), and *Barnert Hospital Center*, 217 NLRB 775 (1975). We do not disavow those decisions here, nor do we indicate that we shall henceforth require any more convincing showing of professional status where technologists are concerned. We simply find that the record in this case does not support a finding of professional status on the part of the Employer's technologists.

¹⁰The tally of votes in the nonprofessional unit election resulted in 48 votes for and 40 votes against representation, with no challenged ballots. Even if all six technologists' votes were included in that tally, they could not alter the results.

We are mindful of the fact that the Respondent is being required to bargain with a unit which now includes medical technologists and medical laboratory technologists, classifications that were not previously part of the unit when the election was conducted to determine whether the nonprofessionals wanted union representation. The scope of the unit, however, has not changed because the overall classification of technicals was originally included. Cf. *NLRB v. Lorimar Productions*, 771 F.2d 1294 (9th Cir. 1985) (where election was conducted in a unit of estimators and production coordinators—a unit which the Board subsequently found was inappropriate. Because the election was conducted on the assumption that the unit would include both groups, the court denied enforcement of the Board's bargaining order and remanded the case for the purpose of conducting a second election because the scope of the unit was changed).

All service, maintenance, technical and clerical employees, excluding day care employees, professional employees, confidential employees, mana-

gerial employees and guards and supervisors as defined in the Act.

THE TWIN CITY HOSPITAL CORPORATION